IN THE

Supreme Court of the United States

October Term, 1956

No. 92

RUDOLPH SCHWARE,

Petitioner,

v.

BOARD OF BAR EXAMINERS OF THE STATE OF NEW MEXICO

On Writ of Certiorari to the Supreme Court of the State of New Mexico

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BRIEF OF PETITIONER

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Constitutional, Statutory and Regulatory Provisions Involved	2
Questions Presented for Review	3
Statement of the Case	4
A. The Affirmative Evidence of Petitioner's Good Moral Character	8
B. Petitioner's Past Connection With the Communist Party	10
C. The Past Arrests of Petitioner	12
D. The Use of Aliases	13
SUMMARY OF ARGUMENT:	
I. The Lack of Substantive Due Process Below	13
I. Substantive Due Process	15
II. The Lack of Procedural Due Process	18
ARGUMENT—Introduction	19
POINT I—Exclusion from the bar because of innocent membership in the Communist Party in the remote past conflicts with the due process clause of the Fourteenth Amendment to the United States Constitution, for it shocks the conscience, is arbitrary and unreasonable, bears no reasonable relationship to the qualifications of an attorney, and stifles free speech and association	20
A. Such a denial shocks the conscience	20

PAGE

B. Such a denial of admission is arbitrary and unreasonable 33

C. There is no reasonable relationship between such past membership and present qualification for the Bar 38

D. The decision below stifles freedom of speech and association 40

POINT II—Exclusion from the Bar because of exercise in the remote past of the ancient common law right to use an alias violates the due process of law required by the Fourteenth Amendment to the United States Constitution 43

POINT III—Exclusion from the Bar because of arrests in the remote past, without prosecution, trial, or arraignment, violates due process of law..... 47

A. The Law 47

B. The Arrests 49

1. The arrests on suspicion of criminal syndicalism during the maritime strike in California 49

2. The arrest for violation of the Neutrality Act 50

3. The Texas arrest re the automobile 52

POINT IV—The failure of respondent to disclose confidential information, its nature (including the identity of adverse informants) or a summary of such information, received by respondent in the course of its determination of Schware's good moral character violates the due process clause of the Fourteenth Amendment of the United States Constitution 53

PAGE

POINT V—The three factors upon which the Court below relied when taken together cannot make constitutional that which is unconstitutional when each is considered separately 57

Summary 58

CONCLUSION 59

Cases

Adler v. Board of Education, 342 U. S. 485, 495-6 40

Bailey v. Richardson, 341 U. S. 918 53
Barsky v. Board of Regents, 347 U. S. 442, 451, 452, 453, 471 ..... 36, 38, 47, 49, 56
Board of Education v. Barnette, 319 U. S. 624, 642 43
Bridges v. Wixon, 326 U. S. 135, 143 35

Cole v. Arkansas, 333 U. S. 196 19
Cole v. Young, 351 U. S. 536 40
Coleman v. Watts, — Fla. —, 81 So. 2d 650 ..... 48, 54
Communications Ass'n v. Douds, 339 U. S. 377, 382, 392, 400, 401, 411, 413-414, 424-433 ..... 22, 34, 38, 41
Cummings v. Missouri, 4 Wall. 277, 318, 319 ..... 38, 39, 48

Daniel v. Family Security Life Ins. Co., 336 U. S. 220 41
de Jonge v. Oregon, 299 U. S. 353 38
Dennis v. United States, 341 U. S. 494, 568, fn. 12 .. 23

Ex Parte Garland, 4 Wall. 333, 378 ..... 38, 54

Galvan v. Press, 347 U. S. 522, 530 20
Garner v. Board of Public Works, 341 U. S. 716, 723, 726, 727-8, 729 ..... 35, 36, 37, 41-42

Hardware Dealers Mutual Fire Insurance Co., v. Glidden, 284 U. S. 151 41

PAGE

Haynes v. Brennan, 135 N. Y. S. 2d 900 (Sup. Ct. N. Y. 1954) 44

Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 93 54

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 171 ..... 48, 56

Kirby v. United States, 174 U. S. 47, 55, 61 54

Lana v. Brennan, 124 N. Y. S. 2d 136, 137-8 (Sup. Ct. N. Y. 1953) 44
Lyons v. State, 32 Ala. App. 44, 21 So. 2d 399, 340 .. 48

Morgan v. United States, 304 U. S. 1, 18 54
Motes v. United States, 178 U. S. 458, 467, 471 54

Norris v. Alabama, 294 U. S. 587, 590 ..... 34, 43

In Re Oliver, 333 U. S. 257, 265 ..... 47, 48

Parker v. Lester, 227 F. 2d 708 (C. A. 9, 1955) 54
Peters v. Hobby, 349 U. S. 331 53

In re Ross, 8 Cal. 2d 608, 67 P. 2d 94 43

Schneiderman v. United States, 320 U. S. 118, 119, 127, 147-8 ..... 23, 40
Shachtman v. Dulles, 225 F. 2d 938 (C. A. D. C., 1955) 47
Sinclair v. United States, 279 U. S. 263, 299 50
Southern Railway Company v. Virginia ex rel. Shirley, 290 U. S. 190 54
Stromberg v. California, 283 U. S. 359, 368 57

United Public Workers v. Mitchell, 330 U. S. 75 42
United States v. Abelene & S. Ry. Co., 265 U. S. 274, 286, 291 54
United States v. Cohen Grocery Co., 255 U. S. 81, 87, 89 54

PAGE

In re Useldinger, 35 Cal. App. 2d 723, 96 P. 2d 958 44

Watkins v. United States, 223 F. 2d 681, 691 42
Wieman v. Updegraff, 344 U. S. 183, 190, 191 ..34, 35, 36, 40
Williams v. North Carolina, 317 U. S. 287, 292 57

Matter of Zanger, 266 N. Y. 165, 194 N. E. 72 (1935) . 44

U. S. Constitution, Statutes and Rules

Neutrality Act of 1816, 18 U. S. C. § 959(a) 3, 12, 50-51

4 New Mexico Statutes (1953 Comp.) § 18-1-8, pp. 84-85 ..... 2, 3

Rules Governing Admission to the Bar of the State of New Mexico (I, III) 3

18 U. S. C. § 2389 50

28 U. S. C. § 1257(3) 1

United States Constitution, Amendment XIV, Section I, Clause 2 2

Texts

Almond, Gabriel A., "The Appeals of Communism" (1954) 22, 24, 25, 26, 27-29, 30, 32, 33

34 Am. Jud. Soc'y 173 (1951) 40

Crossman, Richard, in "The God That Failed" 30

Department of Defense (U. S.), "Know Your Communist Enemy: Who Are Communists and Why?", 8 December 1955, DOD PAM 4-6/DA PAM 21-72/AFP 34-10-2 .....24, 25, 26, 27, 30, 31, 32

PAGE

Eisenhower, Letter to Sen. Watkins, dated April 6, 1953, 99 Cong. Rec. 4321 (1953) 20

Ernst & Loth, "Report on the American Communist" 24, 25, 27, 29, 30-32

Fund for the Republic, "Digest of the Public Record of Communism in the United States"..... 40

Gellhorn, "Individual Freedom and Governmental Restraints" 39, 40

Hicks, Granville, "Where We Came Out" (1954)..25, 27, 37

Koestler, Arthur, in "The God That Failed" (Bantam Ed., 1951) 22, 37

Note, "Good Moral Character As a Prerequisite to Admission to the Bar: Inferences to be Drawn from Past Acts and Prior Membership in the Communist Party, 65 Yale L. J. 873 (1956)....49, 50, 51

Rules for Admission to the Bar (West 1953)..... 40

Steffens, Lincoln (quoted in Hicks, "Where We Came Out") 25

"The God That Failed", ed. by Richard Crossman (Bantam Edition, 1951) 22, 30, 37

Wigmore on Evidence:

Vol. 2, § 276 (1940) and 1955 Supp., esp. p. 24.. 45
Vol. 3, §980*a* (1940, 1955 Supp.) 47

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BRIEF OF PETITIONER

Opinions Below

The majority and minority opinions below, both on the original decision and on the motion for rehearing, are reported at 60 N. M. 304, 291 P. 2d 607.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. Sec. 1257(3), on the ground that the State of New Mexico, acting through respondent, deprived the petitioner of property (the right or privilege to practice

law) without the due process of law required by the Fourteenth Amendment to the United States Constitution.

The order reviewed herein was made and entered on September 7, 1955 (R. 127).[1] An order denying a timely motion for rehearing was made and entered on December 19, 1955 (R. 153). On March 16, 1956, Mr. Justice Clark of this Court granted an order extending the time for filing a petition for writ of certiorari up to and including May 17, 1956 (R. 163). The petition for writ of certiorari was filed on May 17, 1956. This Court granted certiorari on October 8, 1956 (R. 163), 352 U. S. —, 77 S. Ct. 34.

Constitutional, Statutory and Regulatory Provisions Involved

(a) *Constitutional Provision*—United States Constitution, Amendment XIV, Section 1, Clause 2: " * * * nor shall any State deprive any person of * * * property, without due process of law."

(b) *Statutory Provisions*—N.M.S. (1953 Comp.) § 18-1-8: "With the advice and approval of the Supreme Court, the board [of commisioners of the state bar] shall have power to constitute and appoint five (5) members of the state bar as a special committee to examine candidates for admission to the bar as to their qualifications, and to recommend such as fulfill the same to the Supreme Court for admission to practice under this act. The approval of the Supreme Court of such recommendations shall entitle such applicants to be enrolled as members of the state bar and to practice law, upon taking oath to support the Constitution and the laws of the United States and the State of New Mexico. Such special committee shall be known as the state board of bar examiners * * *" (Adopted as N. M. Sess. L. 1925, c. 100,

[1] Such references are to pages in the Transcript of Record in this Court.

§ 7, amended N. M. Sess. L. 1949, c. 22, § 1. Now found in N. M. S. (1953 Comp.), Vol. 4, pp. 84-85).

Neutrality Act of 1816, 18 U. S. C. § 959(a): "Whoever, within the United States, enlists or enters himself, or hires or retains another to enlist or enter himself, or to go beyond the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people as a soldier or as a marine or seaman on board any vessel of war, letter of marque, or privateer, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

(c) *Regulatory Provisions*—(Reference is to Rules Governing Admission to the Bar of the State of New Mexico, now found in N. M. S. (1953 Comp.) Vol. 4, pp. 85-89):

> RULE I. *Qualifications:* "(1) • • • An applicant for admission to the Bar either upon examination or certification and motion must be a citizen of the United States, an actual bonafide resident of the State of New Mexico for at least six months prior to admission, 21 years of age and of good moral character • • •."
>
> RULE III. *Examinations:* "(7) • • • Provided that the Board of Bar Examiners may decline to permit any such applicant to take the examination when not satisfied of his good moral character."

Questions Presented for Review

1. Whether a state may, consistent with the due process of law required by the Fourteenth Amendment to the United States Constitution, deny an applicant for admission to the bar permission to take the bar examination, despite overwhelming evidence of the applicant's good moral character, because of (a) the applicant's past use of aliases—though the said use of aliases was legal and in most cases was used in order to avoid racial discrimination and to exercise

labor's right to organize; (b) the applicant's membership in the Communist Party in the remote past—though the applicant's membership was innocent of any knowledge of illegal purposes or other illegality on the part of the organization, was held at a time when there was nothing illegal about such membership, and the applicant since has offered his services in combating Communism to the Federal Bureau of Investigation; and (c) the mere fact that the applicant has been arrested in the remote past—though in no case was the applicant ever indicted, otherwise prosecuted or convicted.

2. Whether, even if the use of one or two of the standards set forth above in "1" under the said circumstances is consistent with the due process clause of the Fourteenth Amendment to the United States Constitution, the use of the other standard or standards which is inconsistent with the aforesaid due process clause does not invalidate the proceedings and require a new hearing.

3. Whether the examination by the Board of Bar Examiners of confidential information, neither said information (including the names of those who gave adverse reports) nor the nature nor a summary of such information being disclosed to the applicant before it arrived at its decision, is inconsistent with the due process clause of the Fourteenth Amendment to the United States Constitution.

Statement of the Case

Within two or three weeks after Rudolph Schware entered the University of New Mexico Law School in 1950, he voluntarily disclosed to the Dean of the Law School his past affiliations in Communist organizations. The Dean then raised no questions as to petitioner's eligibility to the bar, suggested that petitioner be silent on this subject at that time (R. 29, 40, 44, 45), and often gave his opinion to

petitioner that there shouldn't be any difficulty (R. 43). Had the application for permission to take the bar examination inquired as to past Communist affiliations, which it did not (R. 43), Mr. Schware would have fully disclosed them (R. 45). The application disclosed his past use of aliases and past arrests (R. 100, 104-5). All information adverse to Mr. Schware was "openly and freely disclosed" by him to the Board of Bar Examiners (R. 11).

In December 1953, petitioner filed with respondent his application for permission to take the bar examination in February 1954, and was originally advised that he was entitled to take the bar examination in February 1954 (R. 1). But, on appearing at the Supreme Court of New Mexico on February 22, 1954, he was advised by members of the respondent Board that he was not entitled to take the examination (R. 2). At that time, an informal hearing was had (R. 2). Respondent at no time made any claim that petitioner had not answered any questions fully, completely and accurately, either in his application or at his hearing (R. 1, 2, 90, 91).

At the conclusion of the informal hearing, petitioner was again advised that he was not entitled to take the bar examination (R. 2). No transcript of the testimony at said hearing was taken (R. 2), but the following minutes of the action taken by the respondent were recorded and made a matter of public record (R. 3, 91):

> "No. 1309 RUDOLPH SCHWARE. It is moved by Board Member Frank Andrews that the application of Rudolph Schware to take the bar examination be denied for the reason that, taking into consideration the use of aliases by the applicant, his former connection with subversive organizations, and his record of arrests, he has failed to satisfy the Board as to the requisite moral character for admission to the Bar of New Mexico. Whereupon said motion is duly seconded by Board Member Ross L. Malone, and unanimously passed."

Petitioner thereupon asked an opportunity to appear personally before the Board, asking for the basis for its decision and requesting the names of any witnesses who may have given information adverse to him, and further asking to inspect the records and files dealing with such inquiry (R. 2). A special meeting of the respondent was then held on July 16, 1954, for the hearing (R. 2), at which he was for the first time given the above minutes of the February 22 meeting (R. 3).

At the July hearing, Schware's attorney was advised for the first time that the Board had received confidential information against Schware which it refused to disclose (R. 3, 9). One Board member stated that he didn't *"think* our action was motivated in any way by any accusations or anything (*sic*) was made against him or were disclosed in some way by a report" (R. 11). (Emphasis added.) However, while another Board member reiterated that his action was based on disclosures made by petitioner himself, it was stated that petitioner's counsel could not assume that there was nothing adverse in the report (*Ibid.*). The respondent has also stated that the information upon which it acted is "reflected" in the transcript of the July 16, 1954 hearing (R. 93), and that "the bases of the decision of the respondent * * * are not to be found in * * * confidential information, and that said decision * * * is based upon facts disclosed by the petitioner himself" (R. 92). At no time was either the confidential information, or its nature, or a summary thereof, or the names of witnesses against him, disclosed to petitioner (R. 2-3). Petitioner, in applying for a character report, had stated as follows: "I understand that I will not receive and am not entitled to a copy of the report nor to know its contents" (R. 105).

At the hearing, petitioner introduced evidence as to his good moral character, and also went into lengthy discussions of the facts regarding the three grounds relied upon by respondent in denying admission (R. 15-54). This is

analyzed in detail *infra*, at pages 8-13. The Board, however, affirmed its former action (R. 4).

Petitioner filed a petition to review the denial of his application to take the bar examination in the Supreme Court of the State of New Mexico (R. 1-6), asking that the Court be furnished all records dealing with petitioner's application, that it review the denial of the application, and for a judgment that petitioner be allowed to take the bar examination (R. 5). The Supreme Court of New Mexico, Mr. Justice Kiker dissenting, considered the matter "originally", stating that it was "not limited by appellate rules" (R. 106), but nonetheless lent great weight to the decision of the Board of Bar Examiners (R. 125). However, in an opinion denying motion for rehearing, in which petitioner had asserted that a personal hearing should have been had (R. 149), the Court stated that the case had been considered "all with reference to the record of hearing before the Board of Bar Examiners held July 16, 1954", and that the question was "whether applicant had established his good moral character" (R. 150). The Court gave the following as its basis for its original decision (*Ibid.*):

> "Petitioner is also dissatisfied because we did not rule whether former membership in the Communist Party alone establishes a lack or absence of good moral character. The answer to this is the question was not and is not now before us. We stated in our opinion and we reiterate here:
>
> > 'We believe one who has knowingly given his loyalties to such a program and belief for six to seven years during a period of responsible adulthood is a person of questionable character.'
>
> This conduct of petitioner, together with his other former actions in the use of aliases and record of arrests, and his present attitude toward those matters, were the considerations upon which application was denied."

Pursuant to an order of Mr. Justice Clark of this Court extending time to file a petition for writ of certiorari (R. 163), the petition was filed on May 17, 1956. On October 8, 1956, this Court granted certiorari (R. 163).

A. The Affirmative Evidence of Petitioner's Good Moral Character

Background: Petitioner, the son of a penniless immigrant, began work when he was 9 years old (R. 17). His father, a socialist, brought his son up in a socialist atmosphere. Labor unions were petitioner's early concern, when he paid daily visits to the home of Sidney Hillman (President of Amalgamated Clothing Workers Union) during his childhood (R. 16, 17). Petitioner's father and mother were both atheists (R. 41-2).

At the hearing the petitioner presented the following affirmative evidence of his good moral character:

1. After entering the United States Army in January 1943 (R. 103), Schware volunteered for the paratroopers (R. 27), and served therein as instructor (R. 62). While still an atheist, Schware nightly read a chapter of the Bible to a fellow soldier who could not read very well, being the only man in his company who was willing to do this (R. 16, 77-8). (In civilian life, he had escorted a friend's sister to mass (R. 73).)

2. While in the military, he ceased being an atheist, and became religious (R. 30). He is now a firm believer in God (*Ibid.*, 42).

3. He received an honorable discharge from the United States Army (R. 103).

4. Upon his discharge, he remarried his wife in a religious ceremony, a civil ceremony only having been performed when he married her in 1944 (R. 12-13, 30).

5. Both Schware and his wife are members of the local synagogue (R. 30, 31). He wants his children to be religious (R. 42, 50). When his son was born in 1951, he had his son circumcised in the orthodox Jewish ritual known as the Bris (incorrectly referred to in the record as "Brist") (R. 31), by which a male child enters the House of God. His six year old daughter attends Sunday School at the synagogue (*Ibid.*).

6. After leaving the Communist Party, petitioner twice volunteered his services to the FBI in combating Communism (R. 26).

7. In 1950 petitioner established a small anonymous fund for indigent students at his law school, which he has continually kept up and intends to keep up (R. 31).

8. Petitioner presented letters of recommendation from each professor present at the then summer session of the University Law School (R. 32), and the Secretary of the Dean of the Law School testified as to his excellent moral character (R. 57-8).

9. Petitioner presented letters of recommendation from every student in his class whom he could reach with but one exception (R. 32).

10. The Rabbi of petitioner's synagogue confirmed Mr. Schware's evidence as to participation in orthodox religious activities, stated that he had a very high opinion of petitioner, that petitioner was devoted to the ideals of his religion, possessing a very high moral character. He further testified that the principles of Judaism are completely incompatible with those of Communism (R. 55-6).

11. A blind attorney who had attended law school with Mr. Schware testified that Mr. Schware had read to him

when his wife could not do so, and assisted him in many other ways, though many times this was most inconvenient to petitioner. He, too, confirmed petitioner's high moral character (R. 59-60).

12. In 1952, petitioner, upon having received a gift subscription to the People's World (the West Coast Communist newspaper), wrote the paper rejecting the gift subscription (R. 87). The petitioner, however, keeps himself informed on Communism by occasionally reading both Communist literature and the reports of the House Committee on Un-American Activities (R. 36-7).

13. While in law school, petitioner worked to support his wife and two children (R. 29).

B. Petitioner's Past Connection With the Communist Party

Petitioner, after being brought up in the said socialistic, atheistic background, joined the Young Communist League in 1932, when he was 18 years old, when he found that while the socialists in high school backed down when ordered by high school authorities to disband a discussion club, all the members of the Young Communist League stood up for their constitutional freedom of speech, which he thought was important, and refused to disband (R. 18, 19). In 1934, at the age of 20, he joined the Communist Party (R. 19), in opposition to his father's and mother's wishes (R. 19, 38, 39). When his father died in 1937, he came back to his home (R. 25), where his mother persuaded him to leave the Communist Party (R. 38). He rejoined it again, at an unspecified date, but quit the Party in the latter part of 1940 (R. 24-6), making a complete break (R. 52), and ceasing all his Party activities (R. 27). His disillusionment had begun in 1939 as a result of the Stalin-Hitler pact. It was completed in 1940 when he discovered that

he was being used, that the Communist Party was using the union organization of which he was an officer for its own purposes; he reached the conclusion that the aims of the Party were personal advancement of the leaders rather than a belief in principles, had no interest in individuals or principles, and that "those beautiful words (sic) wasn't so much" (R. 25-6).

Petitioner, then an extreme altruist (R. 80), had believed in the "beautiful words" of the Party (R. 25), the "fine" words (R. 33). When he was a member, members considered themselves as "American citizens" who were members of a legal political party (R. 45). He was such an undisciplined Party member that he brought a union he had organized into the American Federation of Labor instead of the Communist-dominated Trades Union Unity League (R. 34). His work in labor unions, while influenced by his Communist Party membership, had been carried on because of his belief in the importance of union activities, which did not in his opinion mean building the trade union movement for the Communist Party (R. 53).

His disbelief in Communist principles was gradual. It may possibly have been as late as *circa* 1944 when he finally repudiated the principles of the Communist Party (R. 51-2). He detests Communism and its principles because he is opposed to the doctrine that the state is all-powerful and the individual does not count, because religion is incompatible with Communism (R. 49), and because he knows the Party wants power, not principles (R. 25-6). He is a believer in capitalism (R. 48), who would never, never join the Communist Party again (R. 47). While he can take the attorney's oath to uphold the Constitution without reservation, he believes that no Communist today could do so without being untrue to all the principles of Communism (R. 47).

C. The Past Arrests of Petitioner

Petitioner was arrested on the following occasions:

(a) In 1934, petitioner was arrested in California on two occasions during the maritime strike of that year (R. 21, 104), on charge of suspicion of criminal syndicalism (R. 21, 22, 104). Though Mr. Schware was never taken before a judge, he was detained on each occasion from three to five days (R. 22, 104). Some two to three thousand persons were arrested during the course of that strike, about 200 of those persons being charged with criminal syndicalism (R. 21). He was never prosecuted, tried or convicted (R. 22). He made a special trip to California to obtain the information as to these arrests (R. 21).

(b) In 1940, he was arrested in Detroit on a charge of violation of the Neutrality Act of 1816 by recruiting soldiers for the legal Spanish Republican government to fight against Franco, Hitler and Mussolini during the Spanish Civil War (R. 22-3, 66, 104-5), which had been part of his activity as part of the Communist Party (R. 25, 35). The charges were nolle prossed (R. 23, 105). He had not realized that he was doing anything illegal, had done his recruiting openly (R. 23), mindful that Europeans had helped the American Revolution (R. 24). His activities consisted of attempting himself to enlist for the Spanish Republican Army and in persuading others to do so (R. 23, 67, 72).

(c) In 1940 or 1941, somewhere in Texas, petitioner was arrested on a charge of suspicion of transporting a stolen vehicle, despite the fact that he had papers in his possession which showed his agency for the owner. He was kept in jail for about three days and was refused permission to contact the owner of the vehicle. No charges were made and he was never tried or convicted (R. 24, 105).

D. The Use of Aliases

In his application for admission, petitioner stated that he used aliases on the following occasions: (1) when he went to work in 1934 in Gloversville, New York, he used an Italian name in order to obtain employment (Jews having considerable difficulty in getting work there in those days) (R. 19-20), and to facilitate unionization of the employees because a large number of them were Italian (R. 34, 35). Once the workers were organized they became affiliated with the American Federation of Labor. He left for his home in New York City and resumed use of his real name (R. 100); (2) he used an Italian alias to obtain employment in California shipyards, where no Jewish person ever worked (R. 20); (3) he used an alias in giving his name to the police after arrest due to labor trouble (R. 21). In 1937, when he was 23 years old, he ceased using aliases, believing that he should not be ashamed of the name of his father (R. 25).

He states that he does not intend to use an alias, that he never will, that he has no reason for it, and if there was a reason, he wouldn't (R. 37-8).

At no time was an alias ever used to deceive persons or to obtain financial benefits (R. 20-1).

SUMMARY OF ARGUMENT [1]

I. The Lack of Substantive Due Process Below

In assessing petitioner's present moral character, the Court below rested entirely on events in Schware's life that had taken place from fifteen to twenty years before the

[1] We have endeavored throughout this brief to avoid duplication of the arguments contained in Petitioner's Opening Brief in No. 5, Oct. Term 1956. Instead, to save the time of the Court, we hereby incorporate by reference the arguments therein insofar as they are applicable to this case. A copy of Petitioner's Opening Brief in No. 5 will be sent to counsel for respondent herein when service of this brief is made upon him.

instant proceeding began, making no attempt to evaluate the significance of his past as it relates to his present moral character. And only present moral character is the standard. The Court below nowheres even considered the possibility that fifteen years of life as a model citizen outweighed whatever errors petitioner had made in his youth. In short, it substituted a non-existent arbitrary standard of past moral character for the existing standard and by so doing violated due process. The only allusion it made to the present was a statement that it relied in part on Schware's present attitude towards his past arrests and past use of aliases, though the record shows no attitude towards either which could be in the least rationally considered as evidencing a lack of moral qualification. It completely ignored the overwhelming evidence of Schware's present fine moral character, thus laying down the rule that a man can never live down ancient events in his life, that he must be judged entirely by such ancient events, and that fifteen years of subsequent good life and good works are not to be even considered in determining the present moral fitness necessary to admission to the Bar. This surely does not comport with due process.

The arbitrariness and unreasonableness of the decision below is further demonstrated, and was further compounded, by the Court's finding lack of moral fibre through the utilization of retroactive political standards of judgment, and through its considering the *ex parte* acts of others and the innocent acts of petitioner as being reasonably related to the question of petitioner's moral character—all without weighing these factors against petitioner's unblemished record of fifteen years of upright eous and moral behavior.

I. Substantive Due Process

Petitioner had been a member of the Communist Party between 1934 and 1940. He joined from idealistic motives; when he learned the true nature of the Party, his idealism caused him to break with it completely. To hold that past innocent membership in the Communist Party thus *per se* renders one of questionable moral character is to violate due process by indiscriminately classifying innocent with knowing activities. Moreover, in judging the degree of culpability to be attached to 1934-1940 membership, the Court below relied entirely on a judicial characterization describing the Party as it was in 1950, thus making not merely a political test, but a retroactive test as well. In addition, the Court below ignored the possibility of changes in view and affiliations, and ignored Schware's idealistic motivations in becoming and remaining a member of and in departing from the Party.

The Court below did concede that there was nothing illegal about the Communist Party during Schware's membership therein. Therefore, any adverse inference as to his bad moral character must have been based on some undefined aspect of the Communist Party which it considered immoral though not illegal. To so sit in judgment upon legal aspects of a political doctrine is to prescribe what is orthodox in politics for future members of the bar, whose independence is a prerequisite for societal functioning. Such prescription of orthodoxy is proscription of freedom of speech and association for our youth, who could not join a group today lest it be proscribed tomorrow—for even if they leave it as soon as they learn its evil side, they can never again prove themselves of the good moral character necessary to enter a learned profession. When this Court ruled four score years ago that past politically-motivated activity was not reasonably related to qualifications for the practice of law, it precluded the decision below.

The decision below is even more clearly seen to be arbitrary and unreasonable when measured against the background of a realistic appraisal of Party membership in the late '30's, the Popular Front period, when all talk of revolution had ceased, and the Party posed —even to its own members—as a model of 20th Century Americanism. Persons joined the Party for idealistic reasons, not knowing of its involvement with espionage and sabotage; the Party kept them busy with slogans and many tasks, thus preventing them from learning the true nature of the Party. When knowledge dawned in the eye of the member, he either left the Party in the light of his new knowledge or advanced to the inner circle of the Party. Schware left.

Seen against this background, a decision finding Schware of questionable character because he had been an idealist who both joined the Party and left it because of his ideals shocks the sense of fair play which is the essence of due process. When Schware is stigmatized as of questionable character because of this, despite his unwavering present opposition to Communism, his offer of aid to the FBI in combating Communism, his devotion to a religion incompatible with Communism, and despite the other overwhelming evidence of his fine moral character, the decision below all the more shocks the conscience.

The Court below added a second factor in disqualifying petitioner, that he had used aliases two decades previously. But in so doing, petitioner had merely been exercising a common law right, especially well-recognized in the states where he had exercised such right. When Schware used aliases to avoid racial and religious discrimination, no moral onus upon him could have possibly resulted. Nor was any adverse inference to be drawn from Schware's having used an alias when he was illegally arrested. No court in the land has ever permitted an adverse inference to be drawn from any such legal uses of aliases. The use of aliases, especially in the remote past, is in no way

reasonably related to the qualifications of an attorney. When petitioner, moreover, ceased using alias twenty years previously and determined then that he would never use them again, it is clearly arbitrary for the use of aliases in the remote past to be considered a disqualifying factor today, especially in view of the exemplary life led by petitioner for fifteen years before he sought admission.

Just as Schware is the only person in the United States who has had past use of alias considered adversely to him, so too is he the first person who has ever had mere past arrests considered against him. Even if such *ex parte* accusations made by policemen without hearing could constitutionally be considered as material to the character of the one accused, still there was nothing in the facts surrounding the arrests to make out even a *prima facie* case of any guilt. Even if he had been guilty of any of the offenses for which he was arrested (which he was not), the Court below did not find (and could not have found) any moral turpitude involved. The Court did not consider, moreover, that the conduct of Schware which prompted his arrests had been motivated by his good moral character. But, in any event, the mere fact of arrests—unaccompanied by prosecution or conviction—cannot constitutionally be a substitute for a finding of guilt. Schware nowheres manifested any attitude toward his past arrests which could reasonably be considered as evidencing lack of good moral character. What the Court below did was to unconstitutionally subvert the fundamental presumption of innocence, which attaches even in proceedings for qualifying a member of the Bar.

And, in any event, the Court's conclusive presumption that arrests two decades previously means lack of good moral character today, despite fifteen years of uprighteous and model behavior, violates due process.

The cumulative effect of the standards used by the Court below is cumulative unconstitutionality. Schware stands

condemned as lacking in good moral character today solely because of the opinion of the Court below (rendered with the gift of hindsight) that Schware used bad political judgment, both in his joining of the Party and his use of aliases and arrests, which occurred because of his living his own idealism and that of the god that failed him. Unless our society wishes to keep communists and former communists as prisoners of the Communist Party, it must open the doors of respectable society to the former communist who lives down his bad political judgment of the past and redeems himself by a decade and a half of virtuous, upright and religious behavior.

II. The Lack of Procedural Due Process

Procedural due process was violated too, for the respondent below considered evidence from undisclosed sources, refusing to disclose either the evidence, a summary thereof, or the names of those persons who gave it. While the respondent indicated that it did not base its decision upon such *ex parte* materials, nowheres is it contended that it was not influenced thereby. Petitioner, moreover, never waived his right to receive the character report or the evidence upon which it was based. The fact that the Court failed to consider the *ex parte* material does not cure the unconstitutional action of the respondent in failing to grant procedural due process, for it gave great weight to respondent's determination. Indeed, it would not have considered the matter in the first place had the respondent reached a favorable determination.

ARGUMENT

Introduction

Though the Court below admitted that Schware "presently enjoys good repute among his teachers, his fellow students and associates and in his synagogue" (R. 125), it completely failed to consider the overwhelming evidence as to his present moral character, casually summing it up in less than one-half of a page of its twenty-five pages of opinions (R. 120); it did not weigh such evidence against what it considered past moral delinquencies; it did not relate what it considered past moral delinquencies to petitioner's present good moral character. It judged the present wholly on the past. By determining Schware's eligibility on the basis of a standard of past moral character, which is wholly inconsistent with the regulatory standard of present moral character, the Court below violated due process. *Cole* v. *Arkansas*, 333 U. S. 196. True, the Court below did rely on what it termed petitioner's "present attitude towards" certain elements of his past, but there is absolutely no evidence in the record of any attitude toward these elements which at all justifies even the slightest adverse inference (see *infra*, pp. 43, fn. 21; 49-50).

The same conclusion of violation of substantive due process is reached by the several lines of argument below as to each of the factors upon which the Court below relied (Points I-III, V, *infra*).

POINT I

Exclusion from the bar because of innocent membership in the Communist Party in the remote past conflicts with the due process clause of the Fourteenth Amendment to the United States Constitution, for it shocks the conscience, is arbitrary and unreasonable, bears no reasonable relationship to the qualifications of an attorney, and stifles free speech and association.

A. Such a denial shocks the conscience.

In *Galvan* v. *Press*, 347 U. S. 522, 530, this Court stated that "much could be said for the view" that deportation "of an alien who is duped into joining the Communist Party, particularly when his conduct antedated the enactment of the legislation under which his deportation is sought" would "shock the sense of fair play—which is the essence of due process * * *." But Congress' plenary power over aliens, together with legislative difficulties in assessing the bona fides of an alien's severance of Party relations since the Party itself had expelled all of its alien members, caused this Court to uphold the deportation of the alien.[2]

Rudolph Schware, petitioner here, is not an alien. He is an American. Long before the existence of any legislation indicating possible illegality, he was duped into joining the Communist Party because its members gave lip service to idealistic ends. When in 1940 he learned that its sweet-sounding siren song of slogans was a veil for its nefarious purposes, he left the Party, ceasing all Party activities, and gradually came to a renunciation of all its

[2] President Eisenhower has asked that the law invoked in that case be restudied because an ouster of former "subversives" may result in an ouster of an alien who has more recently "conducted himself as a model American." Letter to Sen. Watkins, dated April 6, 1953, 99 Cong. Rec. 4321 (1953).

principles.[3] He offered his services to the FBI against the Communist movement. He became a devoted member of a religious faith which is completely incompatible with Communism, and intends to bring his children up as religious persons. For the fifteen years prior to his candidacy for the Bar, he lived an exemplary life, earning the high and universal esteem of associates and teachers. He served

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[3] Paradoxically and unreasonably, the Court below indicated some doubts as to Schware's break with Communist principles in 1944, though it did not rest its decision on that ground. In 1944, the Court complained, Schware wrote an anti-Jim Crow letter to his wife in which he called anti-Communism stupid and dangerous, equating anti-Communism with anti-Semitism and anti-Catholicism (R. 123, 81-2). Precisely what the Court was attempting to prove by this letter is not quite clear; for one thing, Schware had admitted that his sympathy with some Communist principles had not necessarily ceased upon his termination of his membership four years earlier, that it may have ceased in the very year that he wrote the letter (R. 51-2). In any event, the letter itself shows a picture of a non-Communist who could be considered only as a person of good moral standing. For he rested his view that the antis he mentioned were evil mistakes on the ground (*inter alia*) that "They violate Christian ethics." It is absurd to find that a person who recognizes Christian ethics is sympathetic to Communism. Moreover, no pro-Communist would have ever condemned anti-Catholicism as did Schware, since anti-Catholicism as well as anti-all-other-religions-views is a prime doctrine of Communism. In 1944, moreover, petitioner was in the U. S. Army, a fighting ally of Soviet Russia. Anti-Communism might under those circumstances have very well been considered close to treason by most loyal Americans. An Orwellian rewriting of history cannot constitutionally be made the basis for depriving a person of the right or privilege of practicing law. The comments of the Court below amount only to distortion of the record and of historical and philosophical fact. In addition, it should be noted that the 1944 letter defines anti-Communism as discrimination against a minority. The attitude that one should not discriminate against Communists, held even now by outstanding Americans, is hardly proof of sympathy with Communism. And discriminations against Communists in 1944 certainly would not have helped to win the war, as Schware pointed out.

Schware's hangover of Communist beliefs for a period after his complete break with the Communist Party is typical of the ex-

honorably in the armed forces as a paratrooper instructor. He is well-informed now on the theory and dangers of Communism, and is violently anti-Communist. It shocks the conscience and the sense of fair play when it is held that such a man is not of good moral character.

The methodology of reaching this conclusion is shocking, too. The Court below reads adverse inferences into Schware's Communist Party membership from 1932 to 1940 because of Mr. Justice Jackson's 1950 characterization of the Party in 1950 (R. 124, *Communications Ass'n v. Douds*, 339 U. S. 382, 424-433), which was based upon a plethora of literature and congressional investigations[1] which had mainly occurred *after* petitioner quit the Party—even though the Court below was itself startled by the contents of Mr. Justice Jackson's opinion (R. 124). The Court below ignored the facts that even in 1943, courts, administrators, legislators and students were "perplexed"

Communist. Ex-Communist Arthur Koestler, speaking of his own "clinging to the last shred of the torn illusion", writes: "The addiction to the Soviet myth is as tenacious and difficult to cure as any other addiction. After the Lost Weekend in Utopia the temptation is strong to have just one last drop, even if watered down and sold under a different label. And there is always a supply of new labels on the Cominform's black market in ideals. They deal in slogans as bootleggers deal in faked spirits; and the more innocent the customer, the more easily he becomes a victim of the ideological hooch sold under the trade-mark of Peace, Democracy, Progress or what you will." ("The God That Failed", edited by Richard Crossman (Bantam Edition, 1951), at p. 74.)

The only scientific study of what makes and unmakes a Communist was recently conducted at Princeton University under the direction of Prof. Gabriel A. Almond, who reports that the process of "ideological disenchantment after leaving the Party" may take years to complete. Almond, "The Appeals of Communism" (1954), p. 352. See, *passim*, *id.* at 351-355.

[1] Note that Mr. Justice Jackson commented that "Most of this information would be of doubtful admissibility or credibility in a judicial proceeding." 339 U. S. at 424, fn. 2. Yet in the judicial proceeding below, the Court below relied completely upon Mr. Justice Jackson's summary of such information.

by the problem of what the Communist Party truly stood for (*Schneiderman* v. *United States*, 320 U. S. 118, 147-148 and *passim*), that the Supreme Court of the United States in 1943 held that the Government of the United States had failed to prove the existence of any nefarious aims of the Communist Party (*ibid.*),[5] and indeed that the former Presidential candidate of the Republican Party, Wendell Willkie, had in 1943 defended the member of the Party's National Committee whose naturalization was at stake in that case (*id.* at 119, 127).

The decision below becomes even more shocking when Schware's Communist Party experience is measured against that of others who have similarly passed through the pearly gates of Communism only to learn that the pearls are alluring disguises for the bitter poison they contain.

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[5] Mr. Justice Jackson himself summed up the *Schneiderman* case as follows: "Schneiderman v. United States, 320 U. S. 118, overruled earlier holdings that the courts could take judicial notice that the Communist Party does advocate overthrow of the Government by force and violence. This Court reviewed much of the basic Communist literature that is before us now, and held that it was within 'the area of allowable thought', id., 320 U. S. at page 139, that it does not show lack of attachment to the Constitution, and that success of the Communist Party would not necessarily mean the end of representative government. The Court declared further that 'A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open.' Id., 320 U. S. at 157. Moreover, the Court considered that this 'mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—prediction that is not calculated or intended to be presently acted upon, * * *'; ibid., was within the realm of free speech." *Dennis* v. *United States*, 341 U. S. 494, 568, fn. 12.

For most of the persons who entered the Party in the early '30's, like Schware, joined it because of its purported idealistic aims;[6] some were subconsciously influenced, as Schware doubtless was, by the need to rebel against

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[6] The United States has officially recognized this, even as to present Communists. Says the Department of Defense, in its pamphlet "Know Your Communist Enemy: Who Are Communists and Why?" (8 December 1955, DOD PAM 4-6/DA PAM 21-72/AFP 34-10-2), at p. 14: "* * * we have learned that communism attracts most of its followers when they are young. Among the kinds of young people it attracts are: * * * (2) idealists who want a great cause to devote their lives to and who are ignorant of the real nature of communism". The other category of youngster attracted in this country is the neurotic who turns to the Party to give his life direction and meaning. *Ibid.*

Almond, *op. cit., supra,* p. 103, dealing exclusively with former communists, notes that idealism has almost universally been the reason for joining the Party in the past: "Almost all the respondents [subject of the study] perceived the party at the point of joining in terms of one or a combination of its agitational goals, as a means of combating and destroying Fascism, racial, ethnic, and religious discrimination, or imperialism; or positively as a means of attaining trade union objectives, peace, general social improvement, or humanitarian socialist goals. If these findings are an accurate reflection of the general pattern of perception of the movement, then it can be said that the typical party member does not perceive the esoteric properties of the party at the time of joining, but is attracted to one or more of the agitational goals." P. 103. See also pp. 99-126 *passim.*

Ernst & Loth, "Report on the American Communist" (1954), at pp. 183, 184:

"Whatever the combination of psychological factors that led the individual into the party, almost invariably it seemed to that individual that his motives were entirely idealistic. In fact, almost to a man and a woman they began by pointing out that their motives were the betterment of society through fighting war or fascism or discrimination or poverty or some other form of underprivilege and injustice. * * *

"* * * the fact remains that the rank-and-file Communists are idealists. They are selfless and dedicated people * * *. They are quite sincere when they tell us that in the Communist party they seemed to find the most dedicated, if not the wisest or most honest,

parents.[7] Many joined the Party under the same precipitating impetus as did Schware, when they found that the Party was an action organization, while other groups with lofty aims were apparently neither activist nor ardent.[8] Like Schware, the typtical Party member had no knowledge of the espionage activities of some of its members, until the revelation of such activities in the '40's shocked both Communists and non-Communists into awareness.[9] During their years in the Party, most members, like Schware, were

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fighters against fascism or the noisest crusaders for racial equality or the most dramatic proponents of justice for sharecroppers or the unemployed. They sincerely confuse demagogic promises for paradise tomorrow with secret plans for totalitarian dictatorship."

See, also, Granville Hicks, "Where We Came Out" (1954) at p. 48. Hicks notes that "Up to a point and in a curious and highly qualified way, I am proud of having been a Communist." *Id.* at 243.

[7] Almond, *op. cit. supra*, at pp. 104, 261 ff.; Ernst & Loth, *op. cit., supra*, pp. 51-77.

Oddly enough, while 11% of the parents of American Communists were antireligious or indifferent to it, 53% of such parents were pious or observant. Almond, p. 210.

[8] Almond, *op. cit. supra*, p. 127: "Sixty-nine percent [of ex-Communists studied] voluntarily gave the militance and aggressiveness of the party as one of their reasons for joining it."

Says the Department of Defense, *op. cit. supra*, p. 9, "But the socialist program no longer [during the depression] seemed adequate. To quote Hicks: 'A socialism of deeds, not of words, was what we were looking for, and it was true that the Communists were active in every strike and every unemployment demonstration and that they were being beaten and jailed and sometimes killed. By comparison the Socialists seemed tame and ineffectual.'" Hicks stressed that even Lincoln Steffens wrote that "Nobody in the world proposes anything basic and real except the Communists" (Hicks, *op. cit. supra* at p. 34).

[9] Hicks, *op. cit. supra*, p. 45: "However, I saw no evidence of espionage or sabotage while I was in the Party." See also p. 95, where Hicks shows he was first enlightened by the Canadian Royal Commission report on the *Gouzenko* case in Canada. See, also, fn. 10, *infra*.

kept busy with beautiful words and high-minded tasks, thus preventing them from learning the real truth.[10] Like Schware, disillusionment began for many with the 1939

[10] Says the Department of Defense, *op. cit. supra*, p. 6:

"* * * most members are not indoctrinated in Marxism or in the real aims of the Communist Party before they join it. Immediately after joining, the recruit is drawn into activities. Thus he is made to feel a part of the Party, even though he does not understand its inner workings or its real aims and purposes. Later he is given all kinds of slogans that are supposed to explain communism and his role in the movement. He learns to repeat these slogans. If he uses the right one, he is 'on the beam.' If he uses the wrong one, he is off.' Thus most Party members are kept busy with activities and slogans.

"Some members gradually become aware of the real purpose of the Party and accept it. They are then ready to move into the inner Party circle and join the hard core of conspirators. Or, as in the case of many rank-and-file members, they may smell a rat, be repelled by the smell of it, and start on the path of disillusionment that takes them out of the Party. Others may simply become bored and drift away from the Party, as was the case with many U. S. Party members."

Almond, *op. cit. supra* at pp. 207, 208, goes into this in more detail: "But while the new recruit is not a Communist, there is one thing he can do immediately: become involved in 'activities.' And so the second stage of assimilation into the party is the stage of being 'activated.' The recruit is given tasks. Indeed, the pressure on him to undertake tasks is ordinarily so great that he is left with little leisure to appraise his new experiences. In the words of our informant, '* * * This is commitment without indoctrination, and only the individual intellect will determine how far he can go on this basis. The devoted party member may be extremely naive politically.' * * *

"The third stage, according to our informant, involves 'sloganization.' 'The CP is ready for our man with slogans. It reduces a policy to manageable proportions for him. All it requires is memory of one or two words, hammered away and repeated endlessly.' If you use the right slogan, you're on the line; and if you use the wrong one, you're off * * *. The typical stage of indoctrination is the slogan stage. Most party members don't get any further than this * * *. This explains in large part the ritualistic atmosphere of the party. That is, you say the right things in the right way and you get along. Hence many people become very good Communists without ever having a serious political thought.'

"Thus most party members live in a world of 'activities' and 'slogans.' They lack the time, energy, skill, and courage to break

Hitler-Stalin pact,[11] and Schware's delay in leaving the Party after disillusionment was typical of the ex-Communist.[12] Many ex-members today give the same reasons as did Schware for leaving the Party.[13]

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through this powerful organizational pressure which devours their time and provides them with a rigid and simple intellectual structure. To make progress beyond this point is to 'break through' or 'break away.' To 'break through' means to become privy to the esoteric party and to accept its integral reduction of all goals and values to the power of the party. To 'break away' means that the dawning realization of the character of the esoteric party produces repulsions which ultimately lead to defection." See also pp. 66-93 for an analysis of the Party's different approach in publications directed to the inner circle and those directed to the average Party member.

Hicks notes, too, that "in the later thirties the party did not even try to * * * discipline * * * all its members." *Op. cit. supra*, p. 66.

The opinion below seemingly draws adverse inferences from the fact that Schware's labor activities were somewhat induced by his Communist beliefs. Says Hicks: "I also believed that the Communists ought to influence and if possible control whatever labor unions they belonged to. (Why not, since the party's policies were, I believed, right?)" *Id.* at p. 45. Note that Schware did not go so far, but instead delivered a union to the AFL.

[11] Almond, *op. cit. supra* at 309; Department of Defense, *op. cit. supra* at p. 9.

[12] Almond, *Op. cit. supra*, p. 337. He explains: "Almost two-thirds of the respondents had doubts about remaining in the party for more than a year before the final break (see Table 1). The number of years spent in doubt varies with rank and tenure in the party. Thus 35 per cent of the high-echelon respondents (who also had the longest tenure) were in doubt for three years or more, as compared with 21 per cent for the low-echelon respondents and 17 per cent for the rank and file. At the other extreme, 32 per cent of the rank and filers had doubts for less than one year, as compared with 12 per cent for the high-echelon respondents." See, also, Ernst & Loth, *op. cit. supra*, pp. 14, 212-219. (As to the lack of importance that the particular event causing the break has to the bona fides of the break, the latter note the "contempt which ex-Communists display toward anyone who leaves the party at a later date than they did". *Id.* at 217.) The Defense Department, *op cit. supra*, p. 6, also notes the "long period of doubt about the aims and practices of the Party" before final disillusionment.

[13] Almond, *op. cit. supra* at pp. 299-300:

"What is interesting in our findings as to these processes of assimilation into and defection from the Communist movement is

This case presents these questions: whether a person who was duped into joining the Communist Party for high moral reasons, who left it when he became aware of its true nature, is in the first instance to be condemned as having been lacking in moral character; and, whether even if some inference of immorality can be drawn from

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that so few of the respondents fully perceived the esoteric party at the point of defection or in their subsequent thinking about their experience. In other words, most of them did not perceive the esoteric party when they joined and were not fully aware of it when they left. To the extent that perception of, and repulsion from, the esoteric party was involved in defection, it typically took the form of a realization that the 'real' party to which they had finally become exposed was different from what it had been represented as being, and that this 'real' party either involved risks and costs which the respondents were unwilling to incur, or was felt to be intrinsically evil in some general way. But it was the rare case who could generalize about the party or explicate this feeling beyond offering such vague characterizations as 'The leaders are all corrupt'; 'They're out to line their pockets'; 'What these boys want is power'; 'They're just Russian puppets'; and the like.

"This finding should not occasion surprise, since clarity in the perception of one's political associations and affiliations is generally rare. What is of importance in this connection is that this is probably as true of most Communists as it is of other groups. This may suggest that the widespread view that all party members are, or that all former party members were, in the same sense participants in the 'conspiracy' is quite inaccurate."

See also *id.* at pp. 305, 306, 308-9, 322:

"The problem which troubled the consciences of quite a few of our respondents was the party's practice of using people, manipulating them, misrepresenting the party's purposes. Seventeen per cent of the respondents referred to these manipulative practices as factors contributing to their defection. * * *" (305).

"More common among the respondents were reactions against threats to their own individuality. * * *" (306).

"Most individuals when joining the party are not fully aware of the integral loyalty demanded by the movement. They consider that there is an identity of national or trade union interests with that of the party, or at least that the two interests do not conflict. It is quite evident that this exclusive claim upon loyalty is not fully perceived by a large proportion of party members at the time of joining, since so many defections occur at the point at which the party insists

such wasted years, the ex-Communist can never redeem himself by good works and subsequent anti-Communism. The Court below gave affirmative answers. We submit that such answers shock the conscience. The ex-Communist who turns anti-Communist, as did Schware, can be a particularly valuable ally in the battle against Communism.[14] Our society can afford neither to make him a

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that national loyalty, trade union loyalty, or minority group loyalty be subordinated to party loyalty.* * *" (308-9).

"Leaving the party thus seems typically to involve not a general appreciation of the character of the party, but a response to specific experiences with certain aspects of it. Often the disillusionment with the party had the same basis as the original 'illusion.' Thus many trade unionists joined the party because they felt there was a coincidence in goals between the party and the union movement, and left the party when they found that it was subordinating the union or unions to its own purposes. * * *

"* * * Most of the generalizations offered by the respondents were of a simple order. Thus the party was described as being essentially concerned with power rather than with moral and humanitarian goals. Twenty per cent of the respondents described it in these terms" (322).

47% of working class members (as was Schware) left the Party like Schware because of its conflict with true trade unionism. *Id.* at 326.

[14] Ernst & Loth, *op. cit. supra* at p. 16:

"The best thing about the Communist party in America is the people who leave it. Not that former party members are heroes. But some have proved that they can be useful citizens, and they represent the best reservoir for an understanding fight against communism that we have. For they are people who know. They know what makes the party tick and what it takes to draw members out of it."

And at pp. 93-4:

"It is at this point that the Communist is redeemable. Our mistake as a nation has been to fail to capitalize on his disillusionment. For in most Communists—in virtually all of the general membership, we believe—there is a strong strain of idealism. Whatever other factors may be involved in their adherence to the party, they are selfless, dedicated people. Furthermore, they have illusions when they join. An idealist with illusions may be almost anything from saint to sinner. It is when he is without illusions but retains his

pariah beyond rehabilitation, nor in this way to deter present Communist Party members from leaving the Party.[15]

Many persons have been in and out of the Party, per-

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ideals that he becomes the most useful citizen. In reclaiming Communists, the trick is to remove the illusions without impairing the ideals." As Richard Crossman says, speaking of ex-Communists in his Introduction to "The God That Failed", *op. cit. supra* at p. 12, "The Devil once lived in Heaven, and those who have not met him are unlikely to recognize an angel when they see one."

Despite the more publicized literature of extreme right-wing ex-Communists, only 2 per cent of ex-Communists finally turn to the extreme right and another 2 per cent finally become conservative, according to Almond's figures. The majority become liberals. Almond, *op. cit. supra* at p. 357.

[15] The Defense Department, *op. cit. supra*, at p. 6, notes that "the difficulties of starting a new life outside [the Party] keep some in who would leave if they dared."

Almond, *op. cit. supra*, at p. 369: "In the American case, the heavy sanctions imposed on former party members are a factor creating difficulties in defection." And at p. 359:

"* * * In other words, in a society in which there is a large, moderate movement representing the interests of the lower income groups, and where no extreme sanctions are imposed on former members of the Communist Party, the process of defection appears to be constructive. Such individuals are reassimilated into political society with a minimum of loss both to the individuals involved and to the society at large."

Cf. Ernst & Loth at 218-19: "If there is no hope of a job or a place in the non-Communist world, how can a Communist afford to leave the party? He may be certain in his own mind that he has no more sympathy with communism. He may be prepared to make a full disclosure of all that he knows to the FBI. But he may also feel himself trapped by an inability to support himself and his family economically and emotionally outside the fold.

"This fear is strengthened when he sees non-Communists hounded because of a suspicion that they sympathized with or helped the movement. The party card-holder can and often does believe that if liberals who are smeared for mere association with a Communist or a Communist group can be ruined, the former party member will be in a hopeless situation. So the average rank-and-filer usually remains in the party for a good deal longer than he would like to; and a good deal longer than is good for society. * * *

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"Nevertheless, it would be a gain for all of us if their term in the party could be shortened. Since they spend about one-fourth

of their period of party membership as prisoners of communism looking for a way out, this could be accomplished if we could create safely a climate in which it would be as painless to give up the party card as it is to drop a magazine subscription. By 'safely' we mean without danger to the security of the nation. At present, disillusionment is not enough to cause an immediate break. An escape needs to be arranged. It still remains to be proved that our society is sufficiently interested in these prisoners to help them get away, and, collaterally, to deter others from joining."

And again at 231:

"The country's record on job discrimination, or perhaps we should say failure to apply proper job discrimination, against former Communists is a sorry one. The one consistently bright spot which we could find is provided by the Roman Catholic Church. Side by side with its strong opposition to communism, the church not only has successfully persuaded a great many Communists to leave the party but has undertaken to help them make new, respectable places for themselves.

"This, of course, is in line with the Catholic doctrine that there is no sin so great that redemption after repentance is impossible. Furthermore, the Catholic Church is opposed to communism as such and is not swayed by fear of losing business or being thought red or being criticized—motives which seem to be as strong in some of the most vocal anti-Communists as any real hatred of communism.

"Where such people spurn the former party member without trying to establish his sincerity or lack of it, the Catholic Church welcomes the former Communist, helps him overcome the loneliness which is the almost inevitable aftermath of escape from the party, steers him into a job if he needs one. If he fears reprisals from party members, the church will even find him a job in another city and help him move there so that he can re-establish himself in an environment where his past is not likely to catch up with him publicly."

At p. 233:

"* * * One of the greatest fears of the disillusioned party member is that he will lose his job and never get another. If he saw employers and fellow workers united to remove that fear, he would not spend one-fourth of his time in the party nerving himself to get out. He could do it when he realized his error. Others might be prevented from joining if a societal attitude were so changed."

At pp. 239-40:

"* * * In a war one does not ask a deserter from the enemy if he is sure he repents sincerely and completely his term of service with the foe. We are glad to get a reduction in the strength of the oppos-

haps seven hundred thousand.[16] It would take page after page to list merely the luminaries, esteemed persons amongst us, who would all have to be stigmatized as was Schware below.[17] To so stignatize is shocking. The only scientific study yet made of what makes and unmakes a Communist is a study recently had at Princeton under the direction of Prof. Gabriel A. Almond, published in 1954 under the title "The Appeals of Communism." A major conclusion of the study sums up succinctly much that we have said (pp. 382-3):

> "* * * What we are defending against the nihilistic threat of Communism is the humane and libertarian tradition of the West. There is nothing more precious or more central to this tradition than the attitude toward the individual implied in Christianity and the protections to human dignity in the common law and in the practices of democracy. If we

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ing army. Yet present attitudes toward the former Communist are much harsher than toward an enemy deserter. One of the most objective of the former Communists we interviewed, one who seemed happier than most, as well as less bitter, told us he thought it was too bad that Communists were kept in the party because they were afraid 'a Senator or Congressman needed a headline more than our nation needed a convert from communism to democracy.' He added thoughtfully:

"'It would not take much to start a stampede of present Communists under 25 years of age to the offices of the FBI. All it needs is that the Committees of Congress act as if they really wanted men and women to get out of the party.'

"We only wish to add that this also should be the attitude of our whole society * * *."

[16] Department of Defense, *op. cit. supra*, p. 6; Ernst & Loth, *op. cit. supra*, p. 14.

[17] Some former members are on the staffs of Congressional Committees, Ernst & Loth, *op. cit. supra* at p. 218. Those who have been admitted members of the Party include such luminaries as the aforementioned Arthur Koestler, plus Richard Wright, André Gide, Stephen Spender, Ignazio Silone, Louis Budenz, Granville Hicks, Budd Schulberg, Robert Rossen, Elia Kazan, etc.

turn against these, we have literally nothing left save wealth and power; and, left with these, the nightmares of our friends abroad that there may be no choice between West and East will have come close to reality.

"In the number of respects, American policies and actions toward domestic Communism in the last few years represent flagrant violations of this tradition. Treating the former party member as though he could never purge himself of his former associations, or setting up as a condition of becoming purged acceptance of the status of a fully compliant committee witness, is one such violation. Denying the privilege of government employment to former party members, or to persons who have been members of 'front' organizations, is another illustration of a violation of both our legal and religious tradition. 'To view all party members as equal participants in the Communist conspiracy is to fly in the face of fact. It has generally been the case that only a minority of the party membership is fully aware of the integral power orientation of the party and of its relation to the Soviet Union. The rest of the party are dupes or half dupes. 'Finally, the penalties imposed for error and self-deception ought not to be the same as the penalties imposed for disloyalty and treason. Our traditions require far greater discrimination in the attribution of guilt and far greater readiness for forgiveness than our actions have reflected."

We demonstrate below that the decision reviewed here violates due process in other ways. We pause to comment that such other violations also demonstrate how the decision of the Court below further shocks the conscience.

B. Such a denial of admission is arbitrary and unreasonable.

The respondent Board had found mere past membership in the Communist Party to be a disqualifying factor. It did not mention whether or not the membership had been "knowing" (R. 91). The Supreme Court of New Mexico,

though it had no evidence whatsoever before it that membership was knowing, yet termed Schware's membership "knowing" (R. 150), despite the uncontroverted evidence before it that Schware had joined the Party through idealistic motives, had heard beautiful words while in the Party, and had left the Party as soon as it became apparent to him that it was an evil force. Such "Indiscriminate classification of innocent with knowing activity must fall as an asertion of arbitrary power" (*Wieman* v. *Updegraff*, 344 U. S. 183, 191), though it be couched in the disguise of a finding of knowledge, which flies in the face of the uncontroverted evidence in the record. *Norris* v. *Alabama*, 294 U. S. 587.

The Court, in arriving at its assumption of knowledge, probably fell into the error of assuming every Party member to be part of the Communist conspiracy (see R. 124). There are, of course, many problems which arise because of the dual nature of the Communist Party today, for it is both a political agitational movement (see *Communications Assn.* v. *Douds*, 339 U. S. 382, 392: "Communists, we may assume, carry on legitimate political activities.") and a part of the Soviet conspiracy. To equate mere Party membership—especially when entered into with the best of intentions—with participation in the conspiratorial aspects of the Party, is to be most arbitrary and unreasonable, is to make the very indiscriminate classification condemned in *Wieman*, *supra*. It is especially arbitrary and unreasonable in the light of the fact that the average Party member didn't learn of its evil aims until just before he either left or joined its inner circle (see p. 33 and fns. 9, 10, *supra*). As this Court has noted:

> "In recent years, many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged. 'They had joined, [but] did not know what it was, they were good, fine young men and women, loyal Americans, but they had been

> trapped into it—because one of the great weaknesses of all Americans, whether an adult or a youth, is to join something'." (The quotation is the testimony of J. Edgar Hoover.) *Wieman* v. *Updegraff*, 344 U. S. 183, 190.

In contemplation of law, indeed, Schware may be said never to have been even affiliated with the Party. As this Court has said, "* * * he who cooperates with such an organization only in its *wholly lawful activities* cannot by that fact be said as a matter of law to be affiliated with it." *Bridges* v. *Wixon*, 326 U. S. 135, 143. (Emphasis the Court's.)

But even if it could be said that Schware had *scienter* in the constitutional sense, nonetheless the Court below acted arbitrarily and unreasonably. This for three reasons:

(1) The Court below failed to take into account the fact that Schware had severed his relations with the Communist Party when its character became apparent to him. By ignoring the possibility of change in views and affiliations—once a Communist, always condemned—it acted arbitrarily and unreasonably. It was the absence of this violation of due process which helped this Court sustain the loyalty oath in *Garner* v. *Board of Public Works*, 341 U. S. 716, where the Court said at 723:

> "Nor are we impressed by the contention that the oath denies due process because its negation is not limited to affiliations with organizations known to the employee to be in the proscribed class. *We have no reason to suppose that the oath is or will be construed* * * * *as affecting adversely those persons* who during their affiliation with a proscribed organization were innocent of its purpose, or those *who severed their relations with any such organization when its character became apparent* * * *." (Emphasis added.)

Mr. Justice Burton, while agreeing that a municipality could exact information from its employees as to past

membership in the Party, construed the oath differently, and therefore dissented in part. His construction of the oath and his resultant constitutional views could have been written for the very case at bar:

> "I cannot agree that under our decisions the oath is valid * * *. The oath is so framed as to operate retrospectively as a perpetual bar to those employees who held certain views at any time since a date five years preceding *the effective date of the ordinance*. It leaves no room for a change of heart. It calls for more than a profession of present loyalty or promise of future attachment. It is not limited in retrospect to any period measured by reasonable relation to the present. In time this ordinance will amount to the requirement of an oath that the affiant has *never* done any of the proscribed acts." *Id.* at 729. (Emphasis Mr. Justice Burton's.)

Accord: *Wieman* v. *Updegraff*, *supra*; *Barsky* v. *Board of Regents*, 347 U. S. 442.

42) The Court below, although it noted that the Communist Party and membership therein were perfectly lawful when Schware was a member (R. 109), nonetheless attached derogatory significance to Schware's membership, holding that such membership made him "of questionable character" (R. 150). However, in upholding the loyalty oath in *Garner*, this Court noted that it had "no reason to suppose that the oath is or will be construed * * * as affecting adversely * * * those who were affiliated with organizations which at one time or another during the period covered * * * were engaged in proscribed activity but not at the time of affiant's affiliation." 341 U. S. at 723. Here, the requirement of good moral character was used to exclude Schware from the Bar because of mere membership in an organization concededly not engaged in illegal activities during his period of membership, nor

otherwise then legally deficient.[18] This was violative of due process.

In *Garner, supra*, Mr. Justice Frankfurter construed the loyalty oath therein exacted as excluding

> "* * * from city employment all persons who are not certain that every organization to which they belonged * * * at any time since 1943 has not since that date advocated the overthrow by 'unlawful means' of the Government of the United States or of the State of California.
>
> "The vice in this oath is that it is not limited to affiliation with organizations known at the time to have advocated overthrow of government." 341 U. S. at 726.

A vice in the case at bar is that Schware's disqualification is based on an affiliation with an organization not known—either then or now—to have had illegal aims or methods at the time of Schware's membership.

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[18] The Court below so conceded (R. 109). See, also, fn. 5 *supra*. Note too that Schware's membership in the Party commenced in 1934. It was, notes Koestler (*op. cit. supra* at p. 62), "* * * the Seventh Congress of the Comintern in 1934, which inaugurated a new policy, a complete negation of the previous one * * *. All revolutionary slogans, references to the class struggle and to the Dictatorship of the Proletariat were in one sweep relegated to the lumber room. They were replaced by a brand new facade, with geranium boxes in the windows, called 'Popular Front for Peace and Against Fascism.' Its doors were wide open to all men of good will—Socialists, Catholics, Conservatives, Nationalists. The notion that we had ever advocated revolution and violence was to be ridiculed as a bogey refuted as a slander spread by reactionary war-mongers. We no longer referred to ourselves as 'Bolsheviks,' nor even as Communists—the public use of the word was now rather frowned at in the Party—we were just simple, honest, peace-loving anti-fascists and defenders of democracy. * * * At last, at last, the working class was united again." Accord, Hicks, *op. cit. supra*, p. 159.

Hicks notes too that "whatever the Party is up to, it always pretends to be nobly serving some great liberal idea." (*Id.* at p. 160.)

(3) Further, in assessing the significance of Communist Party membership, the Court below fell into an error condemned by this Court almost 80 years ago. In *Cummings v. Missouri*, 4 Wall. 277, 318, this Court pointed out not only the severity of depriving a person of office or a position of trust because of past conduct, but also that an oath is constitutionally deficient when "it allows no distinction between acts springing from malignant enmity and acts which may have been prompted by charity, or affection, or relationship." Here, the act of petitioner in joining the Communist Party was prompted not by mere charity, but by the greatest idealism possible under our scheme of government: his devotion to our Bill of Rights. The Court below made no distinction between membership in the Communist Party for such purposes and membership for nefarious purposes. The mere membership in the Communist Party, irrespective of purpose, was enough in the opinion of the Court below to render petitioner of "questionable character."

See, also, as to arbitrariness and unreasonableness, *DeJonge v. Oregon*, 299 U. S. 353; *Communications Assn. v. Douds*, *supra*, at 413-4; *Barsky v. Board of Regents*, 347 U. S. 442, 471 (Mr. Justice Frankfurter, concurring).

C. There is no reasonable relationship between such past membership and present qualification for the Bar.

In *Cummings v. Missouri*, *supra*, and its companion case *Ex Parte Garland*, 4 Wall. 333, this Court carefully considered the question of possible barriers to eligibility for the Bar because of past conduct. Said the Court in *Cummings*:

> "* * * * It is evident from the nature of the pursuits and professions of the parties, placed under disabilities by the constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions. There can be

> no connection between the fact that Mr. Cummings entered or left the state of Missouri to avoid enrollment or draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church; nor can a fact of this kind or the expression of words of sympathy with some of the persons drawn into the Rebellion constitute any evidence of the unfitness of the attorney or counselor to practice his profession * * *. It is manifest upon the simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of these acts at all appropriate as a condition of allowing the exercise of the professions and pursuits." *Id.* at 319.

If, as the Court held in these cases, there is no reasonable relationship between past draft dodging and qualification for the Bar, how can there be a relationship between Party membership and such qualification? If, as this Court held, past sympathy with revolutionists is not reasonably related to an attorney's qualifications, how can past membership in the Party be reasonably related to qualifications for the Bar? And if, finally, past revolutionary acts are not reasonable cause for exclusion from the Bar, how can mere past Party membership be reasonable cause? (Note that Garland ultimately became Attorney General of the United States. Gellhorn, "Individual Freedom and Governmental Restraints", at p. 134). We submit that even if petitioner had *scienter* of the Party's purposes at the time he was a member thereof, such knowing membership in the remote past would still not bear a reasonable relationship to declaring him ineligible for the legal profession fifteen years later—especially when he has been against the Party and led an exemplary life during those last fifteen years.

So far as we are aware, no court in the land has ever permitted the conclusive drawing of an adverse inference from past Party membership, unrelated to any evidence

of present disloyal tendencies.[19] Consideration of such past membership as being conclusively a disqualifying factor, without considering all the surrounding circumstances, violates due process. *Adler* v. *Board of Education*, 342 U. S. 485, 495-6, and see *supra*, p. 20.

D. The decision below stifles freedom of speech and association.

Affirmance of the decision below would severely "inhibit individual freedom of movement", would "stifle the flow of democratic expression and controversy at one of its chief sources." *Wieman* v. *Updegraff*, 344 U. S. at 191. No youth hoping to enter a learned profession could join any but the most orthodox groups or political parties. For if he joins any other group or party, from the best of motives, he risks that someday its idealistic aims will be seen to be camouflage. Even if the group has been tested in Court and not found wanting—as the Communist Party was in *Schneiderman*, *supra*—, even if he leaves when he becomes aware of its evil purposes

[19] But cf. the admission oath in the State of Washington, which requires foreswearing of present and past membership in groups having violent overthrow of the Federal Government as their object. This requirement is discussed at 34 J. Am. Jud. Soc'y. 173 (1951). For collections of references as to exclusion of Communists from the Bar, see Rules for Admission to the Bar (West 1953), 20, 39, 102, and "Digest of the Public Record of Communism in the United States", at pp. 420-426 (published by the Fund for the Republic). For a summary of the pro's and con's of excluding communists from the Bar, with extensive references, see Gellhorn, "Individual Freedom and Governmental Restraints" (1956) at pp. 131-138. Gellhorn also notes the prevalency in our society of loyalty tests, estimating that (at least before *Cole* v. *Young*, 351 U. S. 536) at least 20% of all persons in the United States have been subjected to loyalty tests, plus many of their families (Gellhorn at p. 41). He notes that loyalty tests in various states have been extended to pharmacists, veterinarians, piano tuners, and professional boxers and wrestlers. *Id.* at 129-30.

before his government can prove them, even if he turns against the group and leads an exemplary life for fifteen years thereafter, he cannot enter a learned profession. To so threaten our young people is to do violence to freedom of speech and association. Surely the public has nothing to fear from Mr. Schware's character today—but it has much to fear from the deterrence of the exercise of First Amendment freedoms by our young people which would necessarily result from an affirmance of the decision below. The freedoms of large numbers of persons would be impeded if the decision below were to stand; the danger to the public from a reversal of the decision below are nil. Thus, even under the restrictive test of corollary effects on First Amendment freedoms by exclusion based on thought and association, enunciated by this Court in *Communications Association* v. *Douds*, 339 U. S. 382, 397, 400, the decision below must be reversed.[20]

Mr. Justice Frankfurter has succinctly summed up the deterious effects upon freedom of belief and association of a proscription from government employment for past organizational membership. Said he:

> "It is bound to operate as a real deterrent to people contemplating even innocent associations. How can anyone be sure that an organization with which he affiliates will not at some time in the future be found by a State or National official to advocate overthrow of government by 'unlawful means'? All but the hardiest may well hesitate to join organizations if they know that by such a proscription they will be

[20] Note, too, that the legislative finding of danger, heavily relied upon by this Court in the *Douds* case (*id.* at 391, 401, 411) is lacking here. Even if the presumption that the legislature knows facts [*Daniel* v. *Family Security Life Ins. Co.*, 336 U. S. 220; *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden*, 284 U. S. 151] could be replaced by a presumption that the judiciary knows of dangers from ex-Communist attorneys, it is significant that the Court below made no finding of any such danger, and indeed had nothing before it on which it could have based such a finding.

> permanently disqualified from public employment. These are considerations that cut deep into the traditions of our people. Gregariousness and friendliness are among the most characteristic of American attitudes. Throughout our history they have been manifested in 'joining.'" *Garner* v. *Board of Public Works, supra,* at 727-8.

The Court below found Schware's membership in the Party an excluding factor, moreover, without anything before it to indicate that the Party at the time of Schware's membership advocated "overthrow of government by unlawful means." It instead attached moral reprehensibility upon membership in the Party because of the Party's nature ten years after Schware's membership. It ignored the fact that Communist affiliation between 1934 and 1940 did not mean what Communist affiliation meant in 1950 or 1954. Cf. *Watkins* v. *United States,* 233 F. 2d 681, 691 (dissenting opinion).

> "The needs of security do not require such curbs on what may well be innocuous feelings and associations. Such curbs are indeed self-defeating. They are not merely unjustifiable restraints on individuals. They are not merely productive of an atmosphere of repression uncongenial to the spiritual vitality of a democratic society. The inhibitions which they engender are hostile to the best conditions for securing a high-minded and high-spirited public service." Mr. Justice Frankfurter in *Garner, supra,* at 728.

It should also be noted that while there may be certain restrictions upon speech and association of public employees (*United Public Workers* v. *Mitchell,* 330 U. S. 75), no Court has ever suggested the permissibility of the extension of such non-discriminatory restrictions to embryo attorneys. To permit such inroads would be to restrict the political expression and association of those very persons whose views may be most important to the community. In any event, to deny a person admission to the bar because

of concededly legal membership in what was then a concededly legal political party, because of a feeling that such association was in some vague way immoral (despite undisputed evidence to the contrary) is for the Court below not merely to prescribe what *shall* be orthodox in politics (condemned by this Court in *Board of Education* v. *Barnette*, 319 U. S. 624, 642) but to make a retroactive judgment with the gift of unenlightened hindsight on what *could have* been orthodox in politics. The threats to freedom of speech and association from *post-hoc* judicial determinations of what was at one time moral and immoral in political doctrine, especially when based on facts existing at later times, is too obvious to be labored here.

POINT II

Exclusion from the Bar because of exercise in the remote past of the ancient common law right to use an alias violates the due process of law required by the Fourteenth Amendment to the United States Constitution.

The second factor relied upon by the Supreme Court of New Mexico in denying petitioner the right to take the Bar examination was the fact that he had used aliases nineteen years previously.[21]

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[21] The Court below did indicate that it relied in part upon what it termed petitioner's "present attitude towards" use of aliases (R. 150). Just what the Court meant is somewhat puzzling, inasmuch as there is nothing in the record whatsoever to show the petitioner presently condones the use of aliases. On the contrary, he has refrained from using aliases for nineteen years, and has stated in this proceeding that he would never use them again. Certainly this Court's jurisdiction cannot be defeated by the Court below attempting to dispose of the case on the basis of supposed facts nowhere contained in the record. *Norris* v. *Alabama*, 294 U. S. 587, 590.

The right to use a name other than one's given name is an ancient common law right. It was exercised by petitioner in the states of California and New York. California has long recognized this right and indeed has enacted statutes in affirmation thereof. *In re Ross*, 8 Cal. 2d 608, 67 P. 2d 94; *In re Useldinger*, 35 Cal. App. 2d 723, 96 P. 2d 958. New York, in recognizing this right, has ruled that the use of alias cannot be a bar to a person becoming a policeman (*Haynes* v. *Brennan*, 135 N. Y. S. 2d 900 (Sup. Ct., N. Y., 1954)—not officially reported), and has further ruled that even an attorney who knowingly permits a witness to testify under an assumed name without wrongful motive is not guilty of professional misconduct. *Matter of Zanger*, 266 N. Y. 165, 194 N. E. 72 (1935). Indeed, New York reports show that even Governor Alfred E. Smith once instructed a city employee to work under an assumed name, and the New York courts refused to discharge the city employee. *Lana* v. *Brennan*, 124 N. Y. S. 2d 136 (Sup. Ct., N. Y., 1953—not officially reported). Said the Court:

> "The petitioner, under well-settled legal principles, had a right to change his name and assume a name other than that given to him at birth. In the absence of restrictive legislation, a man may lawfully change his name *at will* without proceedings of any sort. * * * "In assuming the name of 'Joseph Porgie' * * *, the petitioner joined such illustrious company as Presidents Cleveland, Grant and Wilson, and also Mark Twain, Artemus Ward, John Roland, Napoleon Bonaparte and the Duke of Wellington, to cite but a few of the stalwarts who voluntarily changed names, given or surname or both." 124 N. Y. S. 2d at 137-8. (Emphasis supplied.)

It is also significant that despite the vast amount of federal and state legislation aimed at the Communist Party and its members, no law inhibits the use of aliases by Communists, though their frequent use of aliases is well known. It must be remembered that Schware was in a

Communist atmosphere when he used aliases, and doubtless saw no evil because of the prevalence of aliases amongst fellow Party members.

Motion picture, stage, radio and television stars constantly assume aliases, and frequently change them from time to time. Rare is the star who has not changed a name which is easily identifiable as that of a member of a minority religious or ethnic group. Schware did no more when he changed his name to avoid discrimination by employers and to make his organizing activities more palatable to employees. Neither Schware nor stars of the entertainment world are to be condemned as somehow lacking in good moral character; it is our society which is at fault, not they. (We may also note parenthetically that if advocacy or practice of discrimination were to be a disqualifying factor for admission to the Bar, many United States Senators as well as many ordinary attorneys would be ineligible for admission. However, such persons are freely admitted to the Bar, while Schware, the victim of discriminators, is found to be lacking in moral character because he resorted to perfectly legal and ethical means of combating them.) Nor has any Court ever permitted an adverse inference to be drawn from the use of an alias, except in cases where the use of the alias was part of a flight from justice. See cases collected in 2 Wigmore on Evidence, § 276 (1940), and 1955 Supp. thereto, esp. at p. 24.

Surely, for the Court in New Mexico to deny permission to take the Bar examination because of the exercise of a common law right clearly recognized by the states in which it was exercised, attaches an arbitrary and unreasonable requirement to the qualifications for the practice of law. There is no rational relation between the petitioner's legal use of aliases and his character as a potential member of the Bar; certainly, the use of aliases nineteen years previously shows nothing about the character of a man today, especially when he has long since repudiated such use.

Moreover, when the aliases were used in order to avoid racial and religious discrimination, and to gain employment and organize unions, it shocks the conscience to find that the person who must resort to the use of aliases to avoid the consequences of action of others, which violates the spirit of the United States Constitution, is to be so penalized. Failure to consider the motives and purposes of Schware in using aliases also violates due process. See *supra*, p. 38.

The giving of an assumed name to the police twenty-one years previously similarly bears no rational relationship to Schware's moral character today. The police had him in custody, so they could not have been materially misled. His act was concededly legal. The sole purpose of using the alias was to avoid retribution by his employer for arrests which the state impliedly conceded was in error when it failed even to arraign him. Surely this showed no moral turpitude on the part of Schware at the time. Giving a wrong name to the police, even when stemming from less worthy motives, is generally condoned by the public, as shown in the forthcoming movie "Three Brave Men". (The three brave men of the title are a government employee who had given a false name to the police after being arrested in a brawl, his attorney who thinks the matter not significant enough to mention in a forthcoming security risk hearing, and the Assistant Secretary of the Navy who restores the employee to the federal service midst a panoply of publicity.) The use of an alias for the police, while hardly an American past-time, is not generally considered as showing any moral delinquency. Even if such an inference could have been drawn when the alias was used, it is palpably absurd to draw an inference of moral delinquency today from such an act committed twenty-one years previously.

POINT III

Exclusion from the Bar because of arrests in the remote past, without prosecution, trial, or arraignment, violates due process of law.

A. The Law.

Your petitioner had the unfortunate experience of being erroneously arrested four times. The Court below ruled that an arrest *per se*, even without arraignment, prosecution, trial or conviction, or other determination of guilt, is a factor in barring admission to the Bar.

The question presented by such ruling has not previously been determined by this Court. This Court has indicated that a State may constitutionally make the absence of a conviction a condition of admission to a learned profession (see *Barsky* v. *Board of Regents*, 347 U. S. 442, 451), though it expressed doubts as to whether automatic expulsion from a profession solely because of a conviction is constitutionally valid. *Id.* at 452.

Perhaps the reason that this Court has never been called upon to decide the precise question at issue is because no Court heretofore has ever considered a mere arrest as being sufficient derogatory information upon which to predicate the denial of a privilege or right. Even an indictment cannot be used as evidence against the person indicted. *In Re Oliver*, 333 U. S. 257, 265. An arrest cannot be used, within a criminal or civil court, to impeach a witness. 3 Wigmore on Evidence, § 980*a* (1940, 1955 Supp.). It is arbitrary and unreasonable to deny admission to the bar because of arrests. For an arrest is nothing more than an accusation by a police officer. It would seem fundamental to our American way of life to rule that no person can be denied a privilege merely because of an *ex parte* accusation. *Shachtman* v. *Dulles*, 225 F. 2d 938 (C. A. D. C. 1955). This flows from this Court's decision

in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, wherein a majority of this Court held that the United States Attorney General could not legally list an organization as subversive and even collaterally thus deprive it of privileges without a hearing. Four members of this Court squarely held that for the Attorney General to do so is a violation of due process. *A fortiori*, policemen should not be allowed to deprive a person of a privilege merely by arrest when that person is never prosecuted or convicted. To permit a policeman to do so is to permit him to act *ex parte* as prosecutor, judge and jury. Cf. *In Re Oliver*, 333 U. S. 257. Any other rule would leave the way open to clear abuse. Should the decision below be allowed to stand, any person could be barred from the practice of law merely because he had erroneously or maliciously been arrested by a police officer. Cf. *Lyons* v. *State*, 32 Ala. App. 44, 21 So. 2d 339, 340. To permit an arrest to be considered as derogatory information is to violate due process, to pervert the fundamental American theory of justice, which is that a man is innocent until he is proven guilty, after trial by due process of law. *Cummings* v. *Missouri*, 4 Wall. at 328.[22] If police officers, by virtue of the decision below, can be the arbiters of a person's privilege to practice law, then we have indeed reached a black day in our constitutional history.

We do not deny that, even in the absence of arraignment, prosecution, trial or conviction, the Court below might have properly considered the past acts causing the arrests insofar as they were relevant to present moral character. However, the arrests *per se* were unconstitutionally considered

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[22] Note, too, that even though an applicant bears the burden of proof, once charges of a criminal nature are involved, it is "fundamental and unchangeable" that he must be held innocent until proven guilty. *Cummings* v. *Missouri*, 4 Wall., at 328. In any event, the burden of proof must shift from the applicant after he makes out a *prima facie* case of present good moral character, as Schware did by overwhelming proof. See *Coleman* v. *Watts*, — Fla. —, So. 2d 650.

a disqualifying factor, as was the use of aliases, without any finding that the acts causing the arrests in any way showed moral turpitude, and without considering whether they showed any lack of moral character today. Cf. *Barsky v. Board of Regents*, 347 U. S. 442, 451-2. Nonetheless, we present now a discussion of the facts surrounding the arrests.

B. The Arrests.

1. THE ARRESTS ON SUSPICION OF CRIMINAL SYNDICALISM DURING THE MARITIME STRIKE IN CALIFORNIA.

The respondent, upon being advised that these arrests were "in the course of a strike" upon the charge of "commission of an act in which somebody attempts to overthrow or subvert the state government" (R. 22-3), made no attempt at all to question Schware's statement that the arrest was the result of labor activities; as the record shows, the mere fact that he had been arrested was enough to find ineligibility. The fact that Schware was never arraigned or tried on the charges, that they were dismissed, that he was held illegally on these charges—no significance was attached to these facts whatsoever. Nor was any significance attached to the fact that Schware's was but one of 2,000-3,000 arrests during that strike, 200 of whom were charged with criminal syndicalism. As the Yale Law Journal recently commented in regard to the case at bar:

> "* * * in an era of turbulent labor relations, detentions followed by release without arraignment during a strike in which several thousand persons were similarly arrested can scarcely be taken as evidence of unfitness to practice as an attorney twenty years later." Note, "Good Moral Character" As a Prerequisite to Admission to the Bar: Inferences to Be Drawn From Past Acts and Prior Membership in the Communist Party, 65 Yale L. J. 873, 881 (1956) (cited hereinafter as "Note").

The Note goes on to point out that there was subsequent Congressional criticism of the arrests. *Ibid.*, fn. 46.

Paradoxically enough, the Court below held that Schware's explaining this to the Board indicated an evil present attitude towards his record of arrests, stating that he thus "*excuses* his arrests" (R. 125, emphasis supplied). To convert a perfectly reasonable explication of the facts surrounding an arrest into an excuse for an arrest, and to then rule that this evidences a bad present attitude toward the arrest is to flaunt the record as well as to do violence to reason. It is to be arbitrary and unreasonable.

2. The arrest for violation of the Neutrality Act.

It is undisputed that Schware's recruiting for persons to fight Franco, Hitler and Mussolini was openly conducted, in ignorance of the fact that he might be violating the law. It is undisputed that Schware's case was nolle prossed. This arrest, says the Court, demonstrates some lack of moral character.

If (as we showed *supra*, p. 39) past draft dodging is not a reasonable basis for denying admission to the Bar, still less could a violation of the Neutrality Act constitute such a basis. There being no evil intent necessary to finding a violation of the Act, no moral turpitude is involved in its violation. *Sinclair* v. *United States*, 279 U. S. 263, 299. Hence, even a violation of this law *per se* imports no lack of good moral character at that time, much less twenty years later.

We believe that petitioner's acts in mere recruiting did not constitute the "hiring or retaining" of persons to serve abroad forbidden by the Act. When Congress wanted to stop recruiting, it used the right word—for in 18 U. S. C. § 2389 it made a criminal of "Whoever *recruits* soldiers or sailors * * * to engage in armed hostility against the [United States]." It has never made criminal recruiting for other purposes. See, also, Mr. Justice Kiker's analysis at R. 131-2, 154-9. In any event, there is no judicial deci-

sion on the precise question; apparently no one has ever been convicted for acts like Schware's. At the worst, it can be said that whether Schware violated the Act is extremely doubtful.

In any event, Schware's acts in recruiting were hardly immoral. While Catholic groups supported Franco's rebels, Protestant and Jewish groups and American educators supported the Loyalists (Note, 65 Yale L. J., at 882, fn. 54). If Schware is to be condemned as immoral, so must those who recruited for the Flying Tigers and for other countries engaged in hostilities during World War II, yet no such persons have ever been prosecuted. (*Ibid.*, fn. 53.) No person has ever been denied naturalization because of violation of the Neutrality Act . (*Ibid.*, fn. 51.)

The Yale Law Journal, after summing up the facts, makes this cogent comment at p. 882:

> "* * * To hold that these facts constitute evidence of unfitness to practice law in 1955 appears to extend the 'good moral character' requirement beyond reason or logic, and to judge Schware on his political beliefs rather than his actions. For Schware's actions were not legally distinguishable from those of many Americans who, a short time later, joined, and urged others to join, British and Canadian forces. Differentiating today between the moral character of those who in 1939-1940 were willing to fight Hitler and those who were willing to fight Franco seems possible only on the basis of subjective political opinion. And employment of such criteria to ascertain fitness for the practice of law unwarrantedly places an applicant at the mercy of the political notions of a bar examiner."

In its reliance on what it termed Schware's "present attitude towards" his record of arrests, the only specification it made beside the one noted *supra*, p. 50, was that "With respect to the arrest in Detroit, for activity in violation of a federal statute, we take it that he regards his work in obtaining recruits for a foreign war as even

commendable because he had concluded which side was right" (R. 125). There is not a word in the record of this case to support the Court's remark. It is sheer conjecture on its part. And even were Schware now proud of what he had done, if he felt that he properly recruited for a foreign power to fight what he believed to be a Fascist revolt against it, supported by Hitler and Mussolini, in ignorance of a law possibly forbidding such recruiting—is this at all relevant to good moral character? If it is, it shows only good moral character. But we believe that political subjective judgments of this sort cannot be constitutionally made.

3. The Texas arrest re the automobile.

Petitioner here showed beyond peradventure that his arrest was so illegal that it could have been the basis for an action for false imprisonment. For despite the fact that he had papers showing his right to possession of the car, the police refused him permission to contact the owner of the car, keeping him in jail two or three days.

Clearly petitioner was guilty of no legal or moral delinquency in Texas. Yet his arrest, the Court below holds, is also a factor in denying admission. Such a ruling is so arbitrary and unreasonable as to verge on the fantastic.

In sum, then, the facts surrounding the arrests show that no moral turpitude was in any way involved in any of them. How, then, can the facts out of which the arrests grew be in any way reasonably related to Schware's moral character at the times thereof, much less twenty years later? We say that they cannot be reasonably related, and that due process was violated below. Nor is there any present attitude of Schware towards his record of arrests which can in any way be considered as reasonably related to his good moral character.

POINT IV

The failure of respondent to disclose confidential information, its nature (including the identity of adverse informants) or a summary of such information, received by respondent in the course of its determination of Schware's good moral character violates the due process clause of the Fourteenth Amendment of the United States Constitution.

Within recent years, the question of the right to know the confidential information received and used against a person in administrative proceedings has been twice exhaustively briefed and argued before this Court. *Bailey* v. *Richardson*, 341 U. S. 918; *Peters* v. *Hobby*, 349 U. S. 331. We believe that we can add nothing to the exhaustive treatment of these issues in the briefs of petitioners in those cases and we do not wish to burden the Court with a mere repetition of such arguments. We therefore here incorporate them by reference.

We also point out that there are major differences between this case and the *Bailey* and *Peters* cases. 1) In those cases the secrecy of the confidential information was justified by the respondent on the basis of the interest of national security, the claim being made that to reveal sources of confidential information would dry up the sources of information upon which the FBI relied. But in the case at bar, there is no problem of the national security, nor is there any problem of the drying up of sources, since the possibility of the same source of confidential information being used in more than one bar admission case is exceedingly remote. 2) Moreover, the second major justification presented for non-disclosure in *Bailey* and *Peters* was that a government employee could be discharged at will and therefore had no right to the protections of due process. But an attorney is not in the same category. *Ex parte*

Garland, 4 Wall. 333, 378. A person who applies for a license does have a right to know the information against him, to know names of accusers, and to cross-examine them, even when considerations of national security militate against such rights. *Parker* v. *Lester*, 227 F. 2d 708 (C. A. 9, 1955). When no such consideration are present, as here, the normal rules of administrative due process apply, and the applicant is entitled to such rights. *Coleman* v. *Watts*, — Fla. —, 81 So. 2d 650; *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 93; *Morgan* v. *United States*, 304 U. S. 1, 18; *Kirby* v. *United States*, 174 U. S. 47, 55, 61; *Motes* v. *United States*, 178 U. S. 458, 467, 471; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 87, 89; *United States* v. *Abelene & S. Ry. Co.*, 265 U. S. 274, 286, 291; *Southern Railway Company* v. *Virginia ex rel. Shirley*, 290 U. S. 190.

An attempt has been made to justify the action of the Court below on two grounds. The first ground is that the petitioner waived whatever right he may have had to examine the derogatory information against him by virtue of his consenting to a character investigation. However, he merely admitted in his application for a character report his understanding that "I will not receive and am not entitled to *a copy of the report* nor to *know its contents*" (R. 105). (Emphasis supplied.) He at no time waived any rights he might have had to learn the names of the witnesses who may have given adverse reports against him and to have access to all records which were used by the Committee as a basis for rejecting his application other than possibly the report itself. (Even as to the report itself, however, while he did admit his understanding that he was not entitled to a copy thereof, he did not waive his right to examine a copy of the report, should his understanding have been in error. And we claim here that such understanding was in error, that he was constitutionally entitled to a copy of the report which contained adverse

information.) Even if it be held that the language in some way amounted to a waiver, a waiver to be a waiver must be voluntary, and it can hardly be said that a statement of this sort which one is required to sign before he can apply for admission to the Bar in any way is voluntary. For if he didn't sign it, it is manifest that he would never have even been considered. Moreover, to require the waiving of a constitutional right before one can apply for membership to the Bar is itself a violation of due process.

The Court below argued that since it considered the proceeding before it as a proceeding *de novo* and since the only member of the Court who did examine the secret derogatory information was the dissenting Justice, petitioner was not prejudiced by the denial of his right. However, it must be noted that the Court below did lend a great weight to the decision of the Board of Bar Examiners (R. 125), so that whatever the influence the adverse information may have had upon the members of the Board of Bar Examiners may well have been reflected in the Supreme Court decision. Moreover, one can hardly be assured that the secret information was not considered by the Board of Bar Examiners (without whose adverse action this case would never have arisen). While the Board of Bar Examiners did state that "The bases of the decision of the respondent in the petitioner's case here sought to be reviewed are not to be found in such confidential information" (R. 92), it nowhere claimed that it was in no way *influenced* by the secret derogatory information. Indeed, we would suggest that despite any self-serving denials behind which it is impossible to probe, the allegations of the respondent even if completely true may not represent a true picture, for there may have been an emotional prejudicing effect of such derogatory information, conscious and/or subconscious. "One has to remember that when one's interest is keenly excited evidence gathers from all

sides around the magnetic point * * *." Mr. Justice Holmes in a letter to Arthur Garfield Hays in 1928, set forth in *Joint Anti Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 171. Thus, it was extremely difficult if not psychologically impossible for respondent to have separated in its thinking the evidence from undisclosed sources from the evidence revealed by petitioner himself. It may well have tipped the balance.

In its brief in opposition to petition for writ of certiorari, respondent herein asserted (p. 24) that withholding of confidential information is justified where an administrative agency fails to rely upon such evidence, citing *Barsky* v. *Bd. of Regents*, 347 U. S. 442, as its authority. However, in that case, the right to cross-examine witnesses and to examine evidence was preserved in the relevant statute (*Id.* at 453). The question was whether known irrelevant evidence as to which the petitioner *had* an opportunity to cross-examine may have unfairly prejudiced the Board against him. We submit that though it is within the competency of an administrative agency to admit evidence which, though irrelevant and possibly with a constitutional taint, is not considered in its determinations, an agency may *not* listen to anonymous and undisclosed evidence, declining to permit disclosure and cross-examination, and later merely make a self-serving declaration that this evidence was not considered, without disclosing to petitioner or the reviewing authorities precisely what that evidence consisted of and without giving him any opportunity to meet it. For no way to determine the truth then exists.

POINT V

The three factors upon which the Court below relied when taken together cannot make constitutional that which is unconstitutional when each is considered separately.

It may be argued that even though one or more of the criteria used by the Court below is repugnant to due process, nonetheless, the Court below did have the right to rely upon the three factors in combination, that by some mysterious process of alchemy, the unconstitutional has been turned into the constitutional by virtue of there being three unconstitutional standards used instead of one. But we believe that the use of three unconstitutional tests cannot make the use of the three tests together constitutional. If this Court believes that one or more of the factors considered did not comport with constitutional standards, then Schware is clearly entitled to a hearing whose outcome should be determined solely on the basis of constitutional standards. *Stromberg* v. *California,* 283 U. S. 359, 368; *Williams* v. *North Carolina,* 317 U. S. 287, 292. In any event, there is no cumulative effect of the three standards used by the Court and Schware's conduct in relation thereto —except that of cumulative unconstitutionality—for none of the things for which Schware was condemned bore any reasonable relationship to his qualifications to practice law. Cumulatively they could not have possessed any greater significance.

We note, too, that if perchance this Court should find that certain uses of aliases and/or certain arrests could be constitutionally considered, nonetheless Schware should be entitled to a hearing free of the taint of those matters which were unconstitutionally considered.

We also suggest to the Court that it need not reach the questions presented by the past arrests, the use of aliases,

and failure to disclose derogatory information, if it determines that petitioner's Party membership could not have been constitutionally considered by the Court below. We say this for the reason that the Board below originally agreed to permit Schware to take the bar examination when it had before it the record of arrests and of aliases, which he had presented to the Board in his application for a character report. It was only after they received the derogatory information against him that they determined that he was ineligible. Since the Board has stated that it acted on no information except facts disclosed by petitioner, it is obvious that the Board below would not have denied Schware permission to take the Bar examination merely because of his use of aliases and record of arrests. We trust that counsel for the Board will admit the accuracy of this statement, which we submit would make unnecessary a decision on Points II, III and IV above.[23]

Summary

Petitioner presented overwhelming evidence of present good moral character, probably as much or more than any person applying for admission to the Bar could ever hope to present. The Court below, in determining whether peti-

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[23] We now mention additional matters which would more appropriately be mentioned in a reply brief, since there will probably be no time in which to file a reply brief. We note that respondent asserted in its brief in opposition to the petition for writ of certiorari that the petitioner allegedly had not accounted for his residence or employment at certain periods (Brief, p. 22). However, the Court below in explaining the basis for its decision was careful not to rely on these factors, probably because the Board itself had admitted in its answer (R. 90, 91) that it at no time contended that the information Schware disclosed in these connections was anything but whole, complete, and accurate, and no hearing was ever had on this question. Hence, the question of Schware's inability to recall all the various employments and addresses he had when he was touring the country in his desperate search for work are of no significance whatsoever in this Court's consideration of the case.

tioner possessed good moral character, looked only to his far distant past, without relating it at all to his present character. In so doing, it considered evidence of several sorts, none of which has any reasonable relationship to either good moral character or to any other requirement that could reasonably be set forth for admission to the Bar. In so doing, moreover, the Court gave great weight to a decision handed down by men who had examined information never disclosed to petitioner. By all these things, it violated due process.

Perhaps most importantly, by making membership in the remote past in an organization not then illegal a criterion for determining eligibility for the Bar, and by making other political judgments, the Court below has severely restricted freedom of speech and association, especially of all young would-be aspirants to the learned professions, without any remotely compensating gain to the welfare of the state.

The decision below violates due process, including the right to freedom of speech and association, and must be reversed.

CONCLUSION

This Court should reverse the judgment below, and order that Schware be permitted to take the Bar examination in the State of New Mexico.

Respectfully submitted,

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